IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 25, 2009

STATE OF TENNESSEE v. TODD BURTON SAMUELSON

Direct Appeal from the Circuit Court for Montgomery County
No. 40500376 John H. Gasaway, III, Judge

No. M2008-01250-CCA-R3-CD - Filed February 12, 2010

After a bench trial, a Montgomery County Circuit Court found the appellant, Todd Burton Samuelson, guilty of second degree murder, a lesser-included offense in an indictment that charged him with first degree murder and tampering with evidence. The court, which dismissed the tampering with evidence count at the close of the State's case, sentenced the appellant to 20 years in prison. On appeal, the appellant argues that the evidence was insufficient to support a conviction for second degree murder and that this court should modify his conviction to voluntary manslaughter. Based upon our review of the record and the parties' briefs, we affirm the judgment of the trial court on the second degree murder charge. We remand to the trial court for entry of a judgment dismissing the tampering with evidence charge.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed and the Case is Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Edward E. DeWerff, (at trial), and Gregory D. Smith, (on appeal), Clarksville, Tennessee, for the appellant, Todd Burton Samuelson.

Robert E. Cooper, Jr., Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Arthur F. Bieber and John E. Finklea, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The proof at trial revealed that the appellant, Todd Burton Samuelson, shot and killed his roommate, Scott Harris, on February 11, 2005, during a dispute over the slow pace at which the appellant was repaying a debt he owed the victim. About a month earlier, before the two were roommates, the victim "fronted" the appellant two pounds of marijuana. The appellant was to eventually pay the victim approximately $2,000 from the proceeds of sales of the marijuana. Over the course of several weeks, the appellant paid only a small portion of his debt. Instead, he smoked a significant amount of the marijuana himself and largely squandered the proceeds from the sales he made.

As the situation deteriorated, the appellant began to fear the victim and started avoiding him. On February 9, the appellant borrowed a friend's 9 millimeter handgun. He then agreed to meet with the victim after the victim got off work on February 11 to discuss the debt face-to-face.

The appellant spent that day smoking marijuana and playing video games while he waited for the victim to get home. He kept the borrowed gun obscured under a magazine on the kitchen table. When the victim got home, the two men began to argue about the money. According to the appellant, the intensity of the argument grew and receded in waves. Ultimately, the appellant grabbed the gun and shot the victim in the back. The gun jammed, so the appellant retreated to a hallway. He returned and shot the victim two more times. Again, the gun jammed. The appellant retreated to clear the jam again, and waited for the victim to die.

After the victim died, the appellant undertook a series of steps to conceal his role in the shooting. He gathered some of the evidence from the house to dispose of it and returned the gun to his friend. He then drove to see his brother in Nashville and lied to him about his role in the victim's death. He also disposed of some of the evidence in Nashville. At his brother's urging, the appellant called 911 then lied to the dispatcher about what happened. Later, he repeatedly lied to the police about the sequence of events and his involvement in them. He told police that he threw the murder weapon into a river and had the police travel with him to Cheatham Dam to videotape a "re-enactment" of that fictitious event. Thereafter, he was charged with first degree murder and tampering with evidence.

The appellant waived his right to a jury and was tried in a bench trial in December 2006. At trial, the State first called Officer Jeffrey Mitchell Derico, who was a road officer with the Clarksville Police Department at the time of the victim's death. Officer Derico arrived at the appellant's house on the morning of February 12, and was met outside by the appellant and the appellant's brother. Upon entering the house, he found the victim's body

laying in the fetal position on the kitchen floor. After determining that the victim was dead, Officer Derico conducted a security sweep of the house and prepared it for the investigation.

When the house was secured, Officer Derico questioned the appellant. The appellant initially told Officer Derico that he last saw the victim on the night of February 10, but he later changed his story and said he last saw the victim at 10:30 on the night of February 11. The appellant also told Officer Derico that he went to Nashville to visit his brother, but he did not explain why.

The State then introduced a transcript of the 911 call the appellant made to report the victim's death on the morning of February 12. During that call, the appellant told the 911 dispatcher that his roommate was dead but that he had no idea how he died. He further informed the dispatcher that he last saw the victim alive on February 10. He specifically told her that he did not see the victim on the night of February 11. According to the appellant, he spoke with the victim by telephone at 9:30 p.m. on February 11, and the victim told the appellant that he was going to play poker. The appellant fell asleep in the home that night and discovered the victim's body when he awoke the next morning.

Sergeant David Crockarell of the Clarksville Police Department also testified that he was in charge of the crime scene investigators. He arrived at the scene on the morning of February 12 to assist his investigators. During his investigation, he found a shell casing stuck in the blinds on the door. He also found a pistol on the floor in the victim's bedroom.

Clarksville Detective Tim Anderson testified that he went to the scene on February 12 after many of the investigators had already arrived. Detective Anderson assisted in collecting evidence of drug use and sales. In particular, he recovered a small amount of marijuana, documentation of sales, and digital scales. He also recovered two boxes of 40 caliber ammunition found in the victim's room.

The State then called Clarksville Police Detective Kenneth Bruce Austion, who also assisted in the investigation on February 12. He recovered some 9 millimeter ammunition from the appellant's dresser.

The appellant's friend, David Louis Griffin, testified that he owned a 9 millimeter Jennings gun at the time of the victim's death. The gun was in fair condition, but it occasionally jammed. He further testified that his practice was to clean the gun anytime anyone touched it.

The appellant borrowed Mr. Griffin's 9 millimeter gun on February 9. Mr. Griffin testified that the appellant asked to borrow the gun because he was contemplating purchasing

one of his own. Although Mr. Griffin and the appellant had been friends for approximately five years and had previously shot the weapon together, the appellant had never before asked to borrow it.

Mr. Griffin went out on the night of February 11 and returned home around 2:00 a.m. on Saturday morning. He did not see the gun when he came home, but when he awoke, he discovered it had been returned. He took out the clip and put the gun away. He did not realize it had been fired until February 13, when he began to clean the weapon and discovered gun powder residue in the barrel.

Sometime after Mr. Griffin cleaned his gun, he learned from a newscast that the Clarksville Police were looking for a 9 millimeter firearm. He immediately suspected that they were looking for his gun. He called the police and turned over his weapon to them.

Joshua Wirtz, who was Mr. Griffin's roommate in February 2005, testified that he was home alone playing video games on the night of February 11. Sometime around 11:00 p.m., the appellant called to inform Mr. Wirtz that he was going to return Mr. Griffin's gun. He arrived at approximately 11:15 p.m. and stayed for about 20 minutes. Mr. Wirtz testified that the appellant did not seem nervous or anxious and that nothing about the appellant's demeanor stuck out in his mind. The appellant asked Mr. Wirtz if he had any money, to which Mr. Wirtz said no. A few days before February 11, the appellant told Mr. Wirtz that his brother was severely injured in a car accident in Alabama. When the appellant returned Mr. Griffin's gun on February 11, he told Mr. Wirtz that he was on his way to see his brother.

The State's next witness was David Randall Odell, a Narcotics Agent with the Major Crimes Unit of the Clarksville Police Department. Based on a statement the appellant gave to another investigator, Agent Odell traveled to Nashville on February 12 to retrieve shell casings from a trash can behind Bailey's Bar on Fourth Street. The shell casings were found in the trash can as the appellant had described.

The victim's friend, Brian David Evans, testified that he was the victim's roommate prior to the victim moving in with the appellant. The victim moved out of their apartment and into the appellant's house on February 1, 2005. The move was the victim's idea, not the appellant's. Mr. Evans also testified that he and several friends, including the victim, were planning to play poker on the night of February 11. The victim was to arrive after he finished his shift as a delivery driver for Pizza Hut, and the game was to start around 10:00 p.m. Mr. Evans stayed at the poker game until about 2:00 a.m., but the victim never arrived.

On cross examination, Mr. Evans testified that, although he knew the appellant, he was closer to the victim. He also acknowledged that the victim was involved in a fight on January 1, 2005.

Ricky Darren Wallace, another friend of the victim, testified that he and his roommate hosted the poker game on February 11. Mr. Wallace called and spoke with the victim sometime between 10:00 and 10:15 p.m. on February 11. The victim told Mr. Wallace that he was lying on the couch at the time but that he was going to eat and then come over for the game. He never came. The game started around 11:00 p.m., and they began to wonder why the victim was absent. Sometime between 11:30 p.m. and midnight, Mr. Wallace tried to call the victim, but could not reach him. He tried again around 2:00 a.m., but there was no answer. Mr. Wallace was not concerned; he simply assumed the victim's plans had changed.

On cross examination, Mr. Wallace noted that he and the victim were friends, whereas the appellant was merely an acquaintance. He also testified that he hosted a New Year's Eve party a few weeks before the victim's death and that the victim got into a fight with someone at the party.

Frederick McClintock, III, an officer in the Clarksville Police Department's Major Crimes Unit, testified that the appellant confessed to law enforcement officials that he killed the victim. He agreed to conduct a re-enactment of both the shooting and how he purportedly disposed of the gun he used to kill the victim. Officer McClintock witnessed and assisted in the video-taping of the appellant's re-enactments on February 12.

During Officer McClintock's testimony, the State introduced a video of the appellant's re-enactments. The video first shows the appellant in his home demonstrating what he did in the chain of events leading to the victim's death. The appellant said that he and the victim were engaged in a heated argument and the victim indicated that he was going to get a gun and "end this." When the victim appeared to reach for a gun, the appellant shot the victim. The gun jammed, so the appellant walked into a hallway to clear the jam. He returned to the kitchen, where the victim was screaming profanities at him and threatening to kill him. The appellant shot the victim a second time, and again the gun jammed. The appellant went back to the hallway to clear the jam. The appellant stated that because his memory of the events was not clear, he did not recall a third shot. The appellant explained that he smoked some cigarettes, picked up the shell casings, and went to Cheatham Dam to dispose of the weapon. At that point, the victim was not making any noise. After disposing of the weapon, the appellant returned home to get his wallet so he could go to Nashville.

The video also shows appellant demonstrating how he threw the gun into the water at the Cheatham Dam recreational area. The appellant explained that he broke the weapon

into two pieces and threw them into the water. He said that one piece went in one direction and the other piece in another direction.

Officer Samuel Knolton, Jr. testified that he went to the victim's residence on February 12. Officer Knolton testified that it did not appear as though an altercation had taken place in the house. The kitchen was very orderly, no furniture had been overturned, and there was no trash on the floor. The residence generally appeared to be "well-kept."

Dr. Bruce Phillip Levy testified that he conducted an autopsy on the victim, which included a blood test to determine if the victim had any narcotics in his system. The results showed only a trace amount of aspirin.

Dr. Levy concluded that the victim's death was a homicide resulting from multiple gunshot wounds to his torso and extremities. Dr. Levy's examination revealed that the victim was shot three times. While Dr. Levy was unable to determine the order in which the shots were fired, he described the results of each shot in detail. Dr. Levy said that one shot passed through the victim's right arm, then entered and exited his chest, and struck his left arm. In order to create that entry and exit pattern, Dr. Levy opined that the victim's arm would have been raised and bent at the elbow. Dr. Levy characterized the injury as a "defensive wound." When the bullet entered the right side of the victim's chest, it caused the most serious injuries the victim experienced in the shooting. The bullet struck the victim's right lung as well as his heart and left lung before it exited the left side of his chest. The bullet exited just below the victim's left armpit and entered his left arm, leaving a superficial injury.

The second shot Dr. Levy described entered the victim's right buttock near his hip. It exited the front of the victim's right thigh. This shot caused injury to the victim's muscle, fat, and skin, but it did not strike any vital organs or damage his hip bone.

The third shot entered the back of the victim's right calf, just below the knee, and re-entered the victim's body just above the knee on the inside of his left leg. It exited the front of his left leg just above the knee and on the inside of the thigh. Dr. Levy explained that the first entry and exit caused soft tissue damage to the victim's leg but did not damage any bones or blood vessels. The second entry and exit caused only very superficial injuries to the skin and soft tissue. Dr. Levy concluded that this entry and exit pattern indicated that the victim's right leg was bent up and placed over his left leg.

Dr. Levy could not determine the order the shots were fired based on autopsy alone. However, with the aid of a transcript of a statement from the appellant, he was able to conclude that the victim was first shot in the buttock/hip. Dr. Levy was unable to determine the order of the other shots. He said that the victim would not have been incapacitated by the

two shots to his lower body. With respect to the shot to the victim's upper body, Dr. Levy concluded the victim would have retained mobility for approximately 30 to 90 seconds, until the loss of blood caused him to lose consciousness.

The appellant's brother, Chad Edward Samuelson, testified that he was manager of Bailey's Bar in Nashville at the time of the victim's death. Because he was the manager, he normally assisted in cleaning up and closing down the bar after its patrons left at 3:00 a.m. He never finished cleaning before 4:00 a.m., and he was sometimes there until 6:00 a.m.

Chad testified that the appellant spent the night with him a few days before February 11 because he owed someone money and was afraid to go home.[1] However, the appellant did not give Chad any details about why he was afraid. Chad testified that he believed the appellant was truly fearful of someone because it was unusual for him to ask to spend the night. Chad explained that he lived approximately an hour and a half away from the appellant, so it was clear to him that the appellant was not simply dropping by.

Chad also testified that the appellant arrived at the bar sometime between 11:30 p.m. and 12:30 a.m. the night of the victim's death. The appellant told Chad that "somebody had killed his roommate and he had killed them." Chad was incredulous and continued his normal closing routine. He finished after 4:00 a.m., and they drove to the appellant's home.

It was after dawn when they reached the appellant's home. Upon seeing the victim's body, Chad instructed the appellant to call the police. When the police arrived, Chad told them that the appellant was high during the killing and that he had "freaked out" and did not know what to do. Chad testified that it would not have been unusual for the appellant to be high all day because he "smoked dope fairly regularly." However, Chad did not believe the appellant was a violent person.

Detective Alan Charvis of the Clarksville Police Department testified that he spoke with the appellant on February 12 and advised him of his Miranda rights. The appellant made a written statement around noon on February 12. The statement was admitted into evidence at trial, and Detective Charvis read the statement into the record as well. The appellant told Detective Charvis that on February 11 he returned home between 10:30 and 11:00 p.m. He turned on the kitchen light and found the victim "in the fetal [position] by the sink." He panicked when he realized the victim was dead. Taking his dog, he left the house and drove to his brother's workplace in Nashville. The appellant's brother, Chad, told him that the victim was probably high on drugs, and that they would check on the victim when Chad

[1] Because the witness and the appellant share the same surname, the court refers to the witness by his first name for clarity.

finished work. They drove to the appellant's house in Clarksville and went into the house. Chad looked at the victim and told the appellant to call 911. The appellant also said that on Thursday, he and the victim went to Montgomery Central to shoot the victim's 40 millimeter Glock. The victim also had a 9 millimeter with him. According to the appellant's statement, the victim had borrowed the 9 millimeter from someone; however, he would not disclose that person's identity because the gun "was illegal."

Detective Timothy Finley of the Clarksville Police Department testified that he was heavily involved in the investigation of the case and participated in multiple interviews of the appellant. He noted that he and other investigators interviewed the appellant on and off throughout February 12. In the evening on February 12, the appellant changed his story and gave a verbal statement to the detective, which the police recorded. An audiotape of the statement was admitted at trial.

During the appellant's seven-minute statement, he admitted that he killed the victim. The appellant explained that he owed the victim $2,000.00 for two pounds of marijuana. The appellant did not have a job, and he proceeded to smoke the marijuana and spend the money from the sales. He occasionally gave the victim some money, but the victim was beginning to get agitated with the appellant. The dispute boiled over on February 11, and after the victim got home from work at about 9:30 p.m., the two argued for about an hour. Sometime between 10:00 and 10:15 p.m., the victim, who was in the kitchen getting a drink, "said f[***] it, I am going to get the Glock and end this s[***] right now." The appellant said he did not know what to do, so he reached for the gun that was on the kitchen table and shot the victim. At that point, the victim "said f[***] you, I am going to kill you," and the appellant retreated toward the hallway because the gun jammed. After clearing the jam, the appellant returned to the kitchen, where the victim again said he was going to kill the appellant. The appellant shot the victim again. The appellant then picked up the shell casings and extra bullets that had fallen on the floor when he was trying to clear the jams. The appellant said that afterward he went to the Cheatham Dam, broke the gun into two pieces, and threw them into the water. He left and drove to a BP gas station but realized he had forgotten his wallet. He drove to his house, retrieved his wallet, and returned to the BP. After stopping at the BP, the appellant drove to Nashville to see his brother. While in Nashville, the appellant wiped off the two shell casings and threw them into a trash can behind the bar where his brother worked.

In his statement, the appellant acknowledged that the victim did not have a weapon on him. He also stated that the 9 millimeter gun that he used to kill the victim was a weapon that the victim had borrowed from a friend. He also acknowledged that the victim was going to a poker game that evening. Finally, he admitted that after he killed the victim, he rifled through the victim's room looking for money and drugs.

Eric Christopher Sorensen testified for the appellant. Mr. Sorensen said that in the weeks prior to his death, the victim was very upset about the appellant's debt.

Christopher Kelly Fields testified that he spoke with the appellant a few days before the victim's death. Mr. Fields described the appellant as upset and scared because of a dispute he was having with the victim, and he asked to stay with Mr. Fields for a few days. The appellant stayed with Mr. Fields approximately six days in the last few weeks before the victim's death.

The appellant testified that he had used drugs since he was thirteen years old. At the time of the shooting, he primarily used marijuana and cocaine. He became a drug dealer around the age of sixteen or seventeen.

The appellant said he met the victim approximately two years before his death. The appellant agreed to allow the victim to move in with him. He explained that his parents owned the house, and he was not paying rent. The appellant thought that allowing the victim to live there rent-free might ease tensions over the debt.

About three weeks after the appellant received the marijuana, the debt became an issue, and the tension increased. The appellant said that after the victim moved in, the victim told the appellant that he needed to "hurry up and get this money." During the conversation the victim was spinning his Glock, which he always carried, around the table with his finger. The appellant acknowledged that he had no realistic means to obtain the money he owed the victim.

The appellant said that a few days before the shooting, he borrowed Mr. Griffin's gun. According to the appellant, he had borrowed the gun a few times, primarily to use as protection from potential robbers and also to enhance his persona as a drug dealer. He also just liked to shoot the weapon.

The appellant said that he spent February 11 smoking marijuana and playing video games. The victim called him from work a couple of times and said that he wanted to talk to the appellant face-to-face that night. When the victim got home from work, he took a shower and talked on the phone in the living room for a while. Eventually an argument about the debt ensued. The intensity of the argument varied over the course of approximately 45 minutes. The dispute heated up again, and the victim said he was going to get his Glock so he could "handle this right now." The appellant said that the victim then "turn[ed] and he stomp[ed] his foot and his hand [went] towards his waist." The appellant grabbed the 9 millimeter, which was laying, partially obscured, on a nearby table, and shot him. His gun jammed and he went to the hallway to clear it. The appellant testified that he was "scared to death" and

wanted to get out of the house. However, the front door was dead bolted and required a key to open. The appellant did not have the key. In addition, in order to exit the front door, the appellant would have needed to move a recliner.

The appellant said that when he returned to the kitchen the victim again threatened the appellant. The appellant said he thought the victim was armed, and he shot the victim two more times and again the gun jammed. He retreated to the hallway and waited until the victim stopped wheezing.

The appellant went back to the kitchen and discovered the victim did not have a gun. At that point, the appellant realized he was in trouble and became very nervous. He smoked several cigarettes, petted his dog, and looked for some money to buy cocaine. He quickly searched the victim's room for money but did not find any. He grabbed some marijuana from his own room and left the house. He returned the gun, came back home to get his dog, bought some gas, and drove to Nashville to see his brother.

When he got to Nashville, the appellant lied to his brother and said that he had killed someone who had killed the victim. He waited for his brother to finish work, and then the two of them traveled back to the appellant's house. When appellant's brother saw the victim, he instructed the appellant to call 911.

The appellant testified that he initially lied to the police at the scene. He explained that when he realized the victim did not have a gun, he knew he would be in trouble. The appellant also admitted that the lies continued as he was questioned by police throughout that day. Indeed, he admitted that the written statement he gave the police contained lies, but the appellant testified that the re-enactments were "fairly accurate."

At the conclusion of the defense's case, the State recalled Mr. Sorensen. Mr. Sorensen then testified that he had seen the appellant with either a 9 millimeter or a 38 caliber gun sometime in the middle of January. He further testified that the appellant "always" had a gun on him.

At the conclusion of the parties' closing statements, the trial court found the appellant guilty of the lesser-included offense of second degree murder.

The trial court sentenced the appellant as a violent offender to 20 years in the Department of Correction.[2]

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[2] The events leading to the appellant's prosecution occurred prior to the 2005 amendments to the (continued...)

II. Analysis

On appeal, the appellant contends that there was insufficient evidence to convict him of second degree murder. When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. See State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not re-weigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the finder of fact. See id. Because a conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Our approach to the analysis is the same where the conviction is the result of a jury trial or, as here, a bench trial.

Second degree murder is defined, in pertinent part, as the "knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1). Voluntary manslaughter, which is a lesser included offense of second degree murder, is "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211(a). Thus, the principal distinction between the two crimes for purposes of this appeal is the existence of adequate provocation.

Because the issue here is the sufficiency of the evidence, the question for us is "merely whether the evidence established all of the elements of second degree murder." State v. Johnson, 909 S.W.2d 461, 464 (Tenn. Crim. App. 1995). In this case, there was sufficient evidence to conclude the appellant knowingly shot and killed the victim. The issue here is whether there was adequate provocation.

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[2](...continued)
Sentencing Act took effect, but his trial and sentencing occurred after the effective date. However, the appellant signed a waiver allowing him to be sentenced under the post-2005 amendment version of the Sentencing Act.

"Whether the acts constitute a 'knowing killing' (second degree murder) or a killing due to 'adequate provocation' (voluntary manslaughter) is a question for [the finder of fact]." Johnson, 909 S.W.2d at 464; see also State v. Williams, 38 S.W.3d 532, 538 (Tenn. 2001). We defer to the finder of fact's evaluation of the evidence and its determination regarding the existence of adequate provocation. See, e.g., Johnson, 909 S.W.2d at 464.

In this case, the trial court heard the appellant's testimony and rejected his claim that he killed the victim in self defense or because of a reasonable provocation. There was more than an adequate basis for that decision. The appellant admitted that he shot the victim three times and, in the middle of doing so, left to clear a jam and returned to resume shooting. Moreover, the evidentiary cornerstone of the appellant's theory was his testimony about the series of events that lead to the shooting and the intensity of the argument he had with the victim. However, the record clearly demonstrates that the appellant consistently lied about the incident on numerous occasions after he killed the victim. Some of the appellant's lies were detailed and intricate. In addition, the house was not in disarray; there was no sign of a heated argument. The victim appears to have been shot in the back first, and the gunshot wounds to his upper body were consistent with a defensive posture. Moreover, although the appellant said he believed the victim was armed, he was not. The trial court was left to weigh these facts against the appellant's credibility. While this Court does not review credibility determinations made by the trier of fact, it suffices to say that there was ample justification for the trial court to discount the appellant's testimony.

The appellant relies heavily on this court's decision in State v. Richard Allen Cox II, No. E2007-00364-CCA-R3-CD, 2008 WL 957972 (Tenn. Crim. App. at Knoxville, Apr. 9, 2008), perm. to appeal denied (Tenn. 2008), for support. That reliance is misplaced. With respect to the case before us, Richard Allen Cox II stands for the proposition that this Court defers to the finder of fact on the question of adequate provocation. See id. at *16. In that case, we held there was sufficient evidence to create a question of fact about the adequacy of the provocation, a question to be resolved by the jury. See id. The same is true here.

In short, whether there was adequate provocation to justify a finding of voluntary manslaughter rather than second degree murder is a question for the trial court in this case. The trial court considered and rejected the appellant's theory. There is no reason for us to second-guess that decision because the evidence is sufficient to support the verdict.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court with respect to Count I. However, as the appellant points out in his brief, the appellate record

does not contain a judgment on Count II. On remand, the trial court is instructed to enter judgment on that count.

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NORMA McGEE OGLE, JUDGE